IN THE SUPREME COURT OF MICHIGAN

APPEAL FROM THE MICHIGAN COURT OF APPEALS

C.A. Docket No. 243645
C.A. Docket No. 243489
L.C. No. 99-000732-CK

RICHARD V. STOKAN,
Plaintiff/Appellee,

v.

HURON COUNTY, ~~a Michigan Municipal corporation,~~
Defendant/Appellant.

APPLICATION FOR LEAVE TO APPEAL

ORAL ARGUMENT REQUESTED

FILED
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CORBIN R. DAVIS
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MICHIGAN SUPREME COURT

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DATE AND NATURE OF ORDERS APPEALED FROM

Defendant/Appellant Huron County sought leave to appeal in the Court of Appeals of the Trial Court's Order entered on *May 31, 2000*, (**Exhibit 1**) granting Plaintiff/Appellee's Motion for Summary Disposition; the Trial Court's Order of *June 18, 2001* (**Exhibit 2**) granting in part Plaintiff/Appellee's partial Motion for Summary Disposition and sanctioning Defendant/Appellant; the Trial Court's Judgment dated *April 25, 2002* (**Exhibit 3**) and the Trial Court's Order of *July 1, 2002* denying Defendant/Appellant's Motion to Set Aside the Judgment (**Exhibit 4**). In addition, Appellant sought the reversal of the Trial Court's denial of Appellant's *July 9, 2002* Motion for Case Evaluation Sanctions against Appellee (**Exhibit 5**). The Court of Appeals affirmed the Trial Court's decisions in its July 8, 2004 decision (**Exhibit 6**). Appellant now respectfully requests leave to appeal from the Court of Appeals judgment based on MCR 7.302(B)(3) because the issue in this matter involves legal principles of major significance to the State's jurisprudence and under MCR 7.302(B)(5) because the decision of the Court of Appeals is clearly erroneous.

STATEMENT OF QUESTIONS PRESENTED

I. **HURON COUNTY RESOLUTION 23-83 REQUIRES A RETIREE TO BE AGE 55 OR OLDER AT THE TIME OF RETIREMENT, AND THAT RETIREE MUST ELECT TO REMAIN UNDER THE HEALTH PLAN PROVIDED BY THE RESOLUTION AT THE TIME OF RETIREMENT. THE COURT OF APPEALS RULED THAT A FORMER COUNTY EMPLOYEE MAY COLLECT BENEFITS EVEN THOUGH HE WAS NOT 55 WHEN HE LEFT THE COUNTY'S EMPLOY AND DID NOT ELECT TO REMAIN UNDER THE PLAN. SHOULD APPELLEE BE ALLOWED TO COLLECT BENEFITS?**

Plaintiff/Appellee Answers: "No."

Defendant/Appellant Answers: "Yes."

Court of Appeals Answered: "No"

II. **MOTION FOR SUMMARY DISPOSITION SHOULD BE DENIED WHERE THERE EXIST ISSUES OF MATERIAL FACT. HERE, TWO COMPETING AFFIDAVITS WERE FILED IN THE LOWER COURT WHICH, ACCORDING TO CASE LAW, CREATES AN ISSUE OF MATERIAL FACT. SHOULD APPELLEE HAVE BEEN ENTITLED TO SUMMARY DISPOSITION?**

Plaintiff/Appellee Answers: "No."

Defendant/Appellant Answers: "Yes."

Court of Appeals Answered: "No"

III. **WAS DEFENDANT ENTITLED TO SANCTIONS UNDER MCR 2.403(O) WHERE THE VERDICT OF $18,206, PLUS ASSESSABLE COSTS AND INTEREST, WAS NOT "MORE FAVORABLE" TO PLAINTIFF THAN THE $40,000 CASE EVALUATION THAT WAS REJECTED BY PLAINTIFF AND ACCEPTED BY DEFENDANT WHERE THE FUTURE PAYMENT OF PREMIUMS WAS NOT UNDER THE CASE EVALUATORS' PURVIEW?**

Plaintiff/Appellee Answers: "No."

Defendant/Appellant Answers: "Yes."

Court of Appeals Answered: "No"

DEFENDANT/APPELLANT'S CONCISE SUMMARY OF THE CASE

The basic issue in this case is whether Plaintiff/Appellee is entitled to health care benefits from Defendant/Appellant pursuant to a Huron County Resolution seven years after he left the county when he did not elect to remain under the plan. In 1983, Defendant/Appellant froze salaries of all non-union elected officials for 1984 due to a budget crisis and, in lieu of a salary increase, enacted Resolution 23-83 as an incentive for the elected officials to remain employed. The resolution provides, in pertinent part:

> BE IT FURTHER RESOLVED, that the premium for the county employee health care benefit plan, as it may be constituted from time to time, **shall be paid by the County for *current employees*, including elected officials**, but excluding those employees whose benefits are determined by or based upon the F.O.P. contract, ***upon retirement from county service*** **after the date of this Resolution as follows, *if an election is made by them to remain under such plan*:**

(**Exhibit 7,** Emphasis added)

The Resolution established a formula for executing the health care benefits. Based upon the March 8, 1983 Resolution, the following table explains the formula:

Age	Years of Service	Percentage of Premium to be Paid
55	10	50%
55	15	75%
55	20	100%
60	10	100%

(**Exhibit 7**).

Plaintiff/Appellee was elected as Huron County Sheriff in 1973 and remained in that position until December 31, 1988, at the age of 48 - well prior to attaining the requisite age of 55. He was employed by the County for a period of 16 years. He left the

county and received benefits from the Michigan Sheriff's Association for seven years. Upon attaining the age of 55 in February 1995, Plaintiff requested and was denied benefits pursuant to Resolution 23-83.

Plaintiff/Appellee filed suit in 1999 seeking the benefits under a breach of contract theory. On December 27, 1999, Plaintiff/Appellee filed a Motion for Partial Summary Disposition pursuant to MCR 2.116(C)(10), arguing that there is was no genuine issue of material fact that he was entitled to the health care benefits at issue. Plaintiff/Appellee submitted an affidavit in support of his motion. Defendant/Appellant filed a response to Plaintiff's Motion on January 11, 2000 along with an affidavit in opposition to Plaintiff/Appellee's affidavit. Three additional briefs were filed with additional affidavits in support of Defendant/Appellant. On April 27, 2002, the Court heard oral argument and found that there was no genuine issue of material fact that Plaintiff/Appellee was entitled to summary disposition on liability, but left open the issue of damages for trial. Plaintiff/Appellee then filed a motion to amend his complaint and a second Motion for Summary Disposition regarding liability which was granted.

The parties then appeared for trial on April 3, 4 and 5, 2002. The Court precluded Defendant/Appellant from litigating the underlying cause of action, and limited the proofs to the issue of whether Plaintiff/Appellee was entitled to health care benefits at a 75% level or a 100% level. Given the limitation, the jury concluded that Plaintiff/Appellee was entitled to benefits at the 75% level and awarded damages in the amount of Fourteen Thousand Dollars. ($14,000.00).

Defendant/Appellant filed an Application for Leave to Appeal to the Michigan Court of Appeals protesting the (i) grant of summary disposition to Plaintiff/Appellee on

May 31, 2000; (ii) the grant of summary disposition and the award of sanctions to Plaintiff/Appellee on *June 18, 2001*; (iii) the verdict of the jury on April 5, 2002 resulting in the Judgment entered on *May 1, 2002*, and; (iv) the Order denying Defendant/Appellee's Motion to set aside the verdict entered on *July 1, 2002*, and; (v) the Trial Court's denial of Case Evaluation Sanctions against Plaintiff. The Court of Appeals affirmed on all counts.

The main issue in this appeal is whether Plaintiff/Appellee is qualified for health care benefits at the time he attained the age of 55. Huron County maintains that the clear and unambiguous language of the ordinance provides that to be eligible to receive County paid retirement health benefits, *a retiring employee must qualify for those benefits at the time of retirement from active service*. Huron County also argues that summary disposition should have never entered on behalf of Plaintiff/Appellee. Further, Huron County contends that if there was an ambiguity in the language of the resolution, the issue should have gone to the jury for consideration as the affidavits of Peggy Koehler, Huron County Clerk, and Ronald Knobloch, a former Huron County Commissioner, contradict the affidavit of Plaintiff/Appellant leaving a question of fact. (**Exhibit 8**, affidavits of Peggy Koehler, and **Exhibit 9**, affidavit of Ronald Knobloch). Both affidavits were attached to Defendant/Appellants response to Plaintiff/Appellee's Motion for Summary Disposition.

The last issue is whether Plaintiff, by forcing this case to proceed to trial rather than accepting a $40,000 case evaluation[1] award, received a verdict that was "more favorable" to him than the case evaluation. Defendant submits that the Judgment for

[1] "Case evaluation" was formerly known as "mediation" under MCR 2.403 until the term was changed in August 2000. For consistency, this Brief will refer to "case evaluation" rather than "mediation" even though the Circuit Court and the parties often refer to the process as "mediation."

Plaintiff, following trial, of just $18,206 was not more favorable to Plaintiff than the $40,000 case evaluation that Plaintiff rejected, even when assessable costs and interest are added. Accordingly, Defendant was erroneously denied case evaluation sanctions under MCR 2.403(O).[2]

SUMMARY OF ARGUMENT

Appellee is not entitled to the payment of health insurance premiums in this matter as (i) he was not 55 years old when he left employment with Huron County as required by the Resolution and; (ii) did not elect to remain under the health plan and therefore is precluded from attempting to re-enter the plan now. Furthermore, summary disposition should not have been entered in favor of Appellee as there were material issues of fact raised by the conflicting affidavits filed at the trial level. In addition, case evaluation sanctions should be awarded to Huron County in this matter because the case evaluators were not allowed to consider future premium payments in their evaluation since that portion of the case had already been decided on summary disposition and the evaluation was considerably less than the judgment at trial.

ARGUMENT

I. THE COURT OF APPEALS SHOULD BE REVERSED BECAUSE THE CLEAR MEANING OF THE HURON COUNTY RESOLUTION REQUIRES A RETIREE TO BE 55 AT THE TIME OF RETIREMENT AND ELECT TO REMAIN UNDER THE HEALTH CARE PLAN.

This is a case in which Appellee would like this Court to believe, metaphorically

[2] The Circuit Court entered Judgment on April 25, 2002, just three (3) days after Plaintiff filed his Notice of Presentment of Judgment (even though Judgment was not to be entered for at least seven (7) days under MCR 2.602(B)(3)). But Defendant never received service of Plaintiff's Notice of Presentment of Judgment prior to entry and had no opportunity to object to the language presented to the Court by Plaintiff. It was not until the Clerk of the Court contacted Defendant's Counsel on May 21, 2002 that Defendant learned Judgment had been entered by the Circuit Court. On July 1, 2002, the Circuit Court denied Defendant's Motion to Set Aside Judgment. In July 2002, Defendant timely filed a Motion for Case Evaluation Sanctions with the Circuit Court and an Application for Leave to Appeal the Judgment with the Court of Appeals.

speaking, that 2+2=5. More specifically, Plaintiff/Appellee asserts that age 48 is equivalent to age 55 for the purposes of retirement benefits. Appellee contends that after retiring from government service after 16 years, at the spry young age of 48, he should be entitled to benefits from the government as if he retired at age 55. The Resolution did not establish a county social security system that would accrue once a person with the requisite experience turned 55. The health care was merely meant for persons who retired from service at age 55 and who had served with the government for 10 or more years to have the benefits of health care in their retirement. In fact, the clear language of the resolution indicates a condition precedent that must be met before benefits are available. Namely, an employee must elect to remain under the health care plan. No such election was made in this case. Nevertheless the Court of Appeals, in effect, disregarded the age requirement and the condition precedent in the Resolution and ruled that Appellee can collect on his benefits.

The resolution at issue provides as follows:

> BE IT FURTHER RESOLVED, that the premium for the county employee health care benefit plan, . . . shall be paid by the county for current employees, including elected officials, . . . **upon retirement from county service** after the date of this Resolution as follows, **if an election is made by them to remain under such plan** . . .

Huron County Resolution 23-83 (emphasis added) (**Exhibit 7**).

The trial court erred in granting summary disposition to Plaintiff/Appellee, twice, when it interpreted Resolution 23-83 contrary to its clear meaning. Under Michigan law: resolutions, ordinances, contracts, and statutes alike must be effectuated as written when they are clear and unambiguous. *Adrian Mobile Home Park v. City of Adrian,* 94 Mich. App. 194; 288 N.W.2d 402 (1980). Importantly, the courts do not have the power to

redraft a statute, as that is within the province of the Legislature. *Id.* at 404. Here, the Court of Appeals has done just that by ignoring the unambiguous terms of the Resolution.

A. Plaintiff's Claim Fails as a Matter of Law Because the Temporal Requirements of Resolution 23-83 Indicate that a Retiree Must be 55 at the Time of Retirement and that He Must Elect to "Remain" Under the Plan at the Time of Retirement.

Resolution 23-83 contains two separate yet consistent temporal requirements: (1) the employee must qualify for the benefit "upon" retirement, and (2) the eligible retiring employee must elect to "remain" under the plan at the time of retirement. Here, the Court of Appeals did not apply the clear meaning of the language, but redrafted the Resolution by disregarding its temporal components.

Defendant/Appellant passed Resolution 23-83, providing certain county officials with paid health insurance benefits upon retirement from active service. (**Exhibit 7**, Resolution of Huron County Board of Commissioners). The language is unequivocal: (1) it requires the employee to qualify for the benefit at the time of retirement, and (2) the eligible retiring employee must elect to remain under the plan at the time of retirement. The above interpretation has been consistently applied to Resolution 23-83 since it passed. In fact, many individuals who did not qualify for benefits pursuant to Resolution 23-83 have retired from the County, and they are **not** receiving County paid health benefits. Others, who met the criteria at the time of their retirement, are receiving that benefit. However, Plaintiff feels that his creative interpretation of Resolution 23-83 may entitle him to a benefit for which no other employee in his situation may get; a judicially created vesting in an undeserved benefit.

Part of the reason retirement benefits begin at age 55 or older is as an incentive for workers to continue their jobs longer. If a person merely requires 10 years of

experience with the government to accrue medical benefits then he could retire anytime after those 10 years and simply wait until he turns 55. Under Appellee's interpretation of the Resolution, an employee who was 35 years old in 1983 who had 10 years of experience at that time could have left the government in 1983 and, in 2003 could have begun collecting health insurance benefits. Such circumstances were not the intention of Resolution 23-83. If the Court of Appeals holding is allowed to stand, the stability of retirement plans can be in jeopardy as former employees file suit to receive benefits long after they have left their government posts.

The Resolution simply provides for additional health insurance benefits to those employees, who retire from active service, who have attained a certain minimum age and years of service at the time of retirement, and who chose to continue those benefits at the time of retirement. Plaintiff freely admits that at the time he last served the County as Sheriff, he had not attained the requisite age 55 or 60 to be eligible for those benefits. Now, over a decade later, the Court of Appeals has modified the intent and meaning of the Resolution, and substituted its judgment for that of the County. The Court of Appeals erred in construing the Resolution to allow an employee to receive benefits when he was not the requisite age at the time of his retirement and did not elect to remain under the plan.

1. The Word "Upon" has a Temporal Meaning Indicating that the Resolution Intended Health Benefits Only for Those Who were 55 or older At the Time of, or "Upon," Their Retirement

The word "upon," prefaces the eligibility for retirement benefits. Perhaps the definition of the word "upon" has many meanings. However, when used to infer a temporal meaning, indicating when something happens or is to be done, it then means,

according to various dictionaries, that this is to be done with little or no interval after. The **Cambridge International Dictionary of English**, Cambridge University Press (1995), states:

> You use 'upon' when mentioning an event that is followed immediately by another.

Although the current Merriam-Webster Dictionary does not define the temporal meaning of the word "upon," the **Webster's 1828 Dictionary**, (1828), includes as one of its meanings, "at the time of." Further, the **Wordsmyth English Dictionary**, Wordsmyth Collaborative (2000) , defines the word "upon" to mean "at the time or occasion of." The example there given is "We greeted the dignitaries upon their arrival." Given the selection of the words of the use "upon retirement" within Resolution 23-83, it clearly indicates that there is a temporal requirement between the retirement and the eligibility for benefits.

Plaintiff/Appellee's Brief in Support of Summary Disposition argued that should Defendant/Appellant have wanted to include a temporal meaning into Resolution 23-83, Defendant/Appellant should have used the words "upon retirement" in the Resolution. (**Exhibit 10**, page 6). This statement is a clear admission by a party under MRE 801(d)(2). Plaintiff/Appellee admitted that if Resolution 23-83 contained the words "upon retirement," that would have sufficient temporal meaning to establish that employees must qualify for the benefit at the time of retirement from active service. One fatal fact Plaintiff/Appellee overlooked was that those very words **are contained** in Resolution 23-83, and, by then using the words "as follows" they apply to each threshold of benefits. As such, Plaintiff/Appellee is now bound by the admission, and the lower Court erred by disregarding the party admission and ruling contrary to the admission.

The language of the Resolution is clear: to receive benefits one must be eligible and in fact receive these benefits at the time of retirement from active service. This is supported by the two (2) temporal components of the Resolution and by a party admission. Accordingly, the decision to grant Plaintiff/Appellee's Motion for Summary Disposition should be reversed and summary disposition must enter for Defendant/Appellant.

2. Appellee Did Not "Elect to Remain Under" the Health Plan as Required by the Condition Precedent of Resolution 23-83.

As noted by the dissent in the Court of Appeals, the language "elect to remain under" creates a condition precedent to receiving benefits under the plan. Appellee made no express election to remain under the plan. The fact that Appellee left the county's employ and received benefits from the Michigan Sheriff's Association illustrates the fact that no election to remain was ever effectuated.

The Court of Appeals dissent stated that:

> the plain language of Resolution 23-83 entitles a retiree to receive some level of health care benefits under the plan **only if, at the time of retirement, the employee elects to remain under the county health care benefit plan**. A former employee cannot elect to remain under the county health care benefit plan where, as here, that employee left the plan several years before his attempted election.

(**Exhibit 6,** Court of Appeals Dissent) (emphasis added).

The dissent went on to note that the Appellee "could not later elect to *remain* under the county employee health care benefit plan because he left that plan some seven years prior when he ceased his employment with the county." The majority's conclusion is clearly erroneous. The Court of Appeals seems to believe that Appellee somehow elected to remain under the health care plan while not receiving benefits from the plan

and was actively enrolled in another plan. (**Exbibit 6**). Such an interpretation of Resolution 23-83 is untenable and would amount to a legal fiction if allowed to stand.

In interpreting Resolution 23-83, the Court must consider the purpose of adding this language; the County provides Blue Cross/Blue Shield health insurance to its employees pursuant to a contract the County has with Blue Cross/Blue Shield. Blue Cross/Blue Shield only allows employers to provide health insurance benefits through that contract to its current employees and those who select continuation of coverage. Accordingly, in order to be eligible to remain under the contract, the employee, must, at the time of retirement, select to continue those benefits; and, must be eligible at the time of retirement. Once benefits cease, they will not later be reinstated. The language of the Resolution, "[i]f an election is made by them to remain under such Plan," clearly encompasses that concept and further supports that the choice of the word "upon," earlier in the Resolution, meaning with little or no interval after retirement. The court of Appeals interpreted this language as reserving benefits in the future rather than "remaining under" the plan. Such an interpretation is clearly erroneous and the Court of Appeals should be reversed.

In addition, all words and phrases in a statute or resolution must be given effect. *Klapp v. United Insurance Group Agency, Inc.*, 468 Mich. 459, 467; 663 N.W.2d 447 (2003); *Danse Corp. v. Madison Heights*, 466 Mich. 175, 182; 644 N.W.2d 721 (2003); *Morris & Doherty, PC v. Lockwood*, 259 Mich.App. 38, 57; 672 N.W.2d 884 (2003). The language "[i]f an election is made by them to remain under such Plan . . ." has been ignored by both the Circuit Court and the majority of the Court of Appeals in this matter. The dissent correctly pointed out that this locution engenders a condition precedent which

has not been met in this case. As such, Appellee's claim fails as a matter of law.

B. The Conflicting Affidavits Presented at Trial Give Rise to Genuine Issues of Material Fact Entitling Huron County to Summary Disposition

The Trial Court applied an incorrect legal standard for summary disposition. This fact was ignored by the Court of Appeals in its opinion. This Court has recently addressed the correct legal standard for motions for summary disposition under MCR 2.116 (C)(10) in two opinions, *Maiden v. Rozwood,* 461 Mich. 109; 697 N.W.2d 817 1999, and *Smith v. Globe Life Ins Co,* 460 Mich. 446; 597 N.W.2d 28 (1999). Both these decisions restate and clarify the current standard which was incorrectly applied in the present situation.

> The purpose of a motion for summary disposition brought under MCR 2.116(C)(10) is to avoid a needless trial of meritless allegations. *See Carry v. Consumers Power Co.,* 64 Mich. App. 292; 235 N.W.2d 765, 766 (1975). MCR 2.116(G)(4) requires a party opposing a motion for summary disposition to introduce additional evidence beyond its pleadings and briefs to show that there is a genuine issue of material fact.

McCart v. J Walter Thompson USA, Inc., 437 Mich. 109; 469 N.W.2d 284 (1991).

The Plaintiff in *Maiden* argued that a motion for summary disposition under MCR 2.116 (C)(10) is properly granted where it is impossible for the claim to be supported by evidence at trial, citing *Rizzo v. Kretschmer, Maiden* at 120. This Court specifically noted that the 1985 Amendment to the Court Rules superseded the standard described in *Rizzo*. The 1985 amendment added sub rule (G) (4) which requires:

> A motion under sub rule (C)(10) must specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact. When a motion under sub rule (C)(10) is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond,

judgment, if appropriate, shall be entered against him or her.

Similarly, the *Smith* opinion states that it is no longer sufficient for a party to promise to offer factual support for their claims at trial: "...[A] party faced with a motion for summary disposition brought under MCR 2.116(C)(10) is, in responding to the motion, required to present evidentiary proofs creating a genuine issue of fact for trial...MCR 2.116(G)(4)." *Smith,* p 455. Therefore, *Maiden* and *Smith* bring all future motions into a single standard and disavowed the use of pre-1985 cases as precedent.

During the Hearing on Plaintiff's Motion for Summary Disposition, the trial court incorrectly applied the wrong standard for Summary Disposition. The court specifically held:

> A motion for summary disposition such as this one brought under MCR 2.116(C)(10), tests whether there is a factual claim for-factual support for the Plaintiff's claim. When deciding that motion, the Court must consider all the pleadings, affidavits, depositions, admissions and so on; and the Court must give the benefit of any reasonable doubt to the party opposing the motion. That would be the Defendant in this case and may not grant the motion unless after reviewing all the pleadings and supporting documentation it would be **impossible for the Plaintiff's claim to be supported at a trial** and that would be because of some deficiency that cannot be overcome; and when a (C)(10) motion is filed, the moving party has to specify the issues for which it claims there is no genuine issue of fact which the Defendant has done-I'm sorry, which the Plaintiff has done; and the opposing party must then respond with affidavits and evidentiary evidence and so on which they have done.

(**Exhibit 11,** at 13-14).

Thus, the trial court should not have applied the "impossibility" standard. The *Smith* opinion clearly states that such a standard is no longer applicable in Michigan: "These *Rizzo*-based standards are reflective of the summary judgment standard under the former General Court Rules of 1963, not MCR 2.116(C)(10)." *Smith* p 455. The *Smith* opinion overrules the prior decisions that approve of *Rizzo*-based standards for reviewing

motions for summary disposition under MCR 2.116(C)(10). Under MCR 2.116, nonmoving parties may no longer promise to offer factual support for their claims at trial.

Under MCR 2.116(G)(4), a party faced with a (C)(10) motion is clearly required to present evidentiary proof creating a genuine issue of material fact for trial. *Id.* As Defendant/Appellant provided such evidence in the form of the affidavits of Peggy Koehler and of Ronald Knobloch, summary disposition in favor of Plaintiff/Appellee was improper and fundamentally unfair to Huron County. (**Exhibits 8** and **9**

In *Dietz vs. WOMETCO West Michigan Television,* 160 Mich. App. 367, 375; 407 N.W. 2d 649, 658 (1997), the Plaintiff filed suit alleging numerous theories of liability with a defamation basis. A motion for summary disposition was filed with competing affidavits pursuant to MCR 2.116(C)(10). This Court considered a case in which competing affidavits were filed. In the *Deitz* case, the Court concluded that competing affidavits gave rise to a genuine issue of material fact, which, required a trial on the merits. *Deitz,* supra, 160 Mich. App. 367 at 378-379. The same conclusion should be reached in this case. There were competing affidavits provided in opposition to summary disposition. In short, reversible error was committed in granting Plaintiff/Appellee's Motion for Summary Disposition.

An additional question of fact involves the status of the Appellee, who never actually retired. The Resolution is clear in that it requires that an individual **retire** from county service and have the status of a "retired employee" to be eligible for benefits. Plaintiff never retired, nor is he a retired employee (**Exhibit 13**). The Court of Appeals erred in disregarding this fact and plaintiff forwarded no evidence whatsoever to contradict this fact. Accordingly, the Trial Court erred granting Plaintiff's Motion for

Summary Disposition, where there exists a genuine issue of material fact. Defendant raised this issue in its Brief in Opposition to Plaintiff's Motion for Summary Disposition dated January 10, 2000 (**Exhibit 12**), forwarded supporting evidence to establish this as an issue of material fact (**Exhibit 8**, Affidavit of Peggy Koehler), yet, nonetheless, the Trial Court found no issue of material fact to exist. Huron County contends this is a reversible error and the Court of Appeals refusal to reverse was clearly erroneous.

II. PLAINTIFF FAILED TO OBTAIN A "MORE FAVORABLE" VERDICT IN CASE EVALUATION AND SHOULD THEREFORE PAY SANCTIONS.

The case evaluation panel, precluded from considering future premium payments, determined that the case should settle for $44,000. Plaintiff/Appellee's judgment totaled $22,608. Therefore, because the judgment was not 10% more favorable than the case evaluation award, Appellee should be required to pay case evaluation sanctions. The Court of Appeals gave this issue short shrift by merely announcing that the "plaintiff also recovered the payment of future premiums." (**Exhibit 6** Court of Appeals Opinion at 5). The Court of Appeals, however, failed to note that the payment of future premiums was no longer an issue because it had been decided based on partial summary disposition.

At the time of the January 18, 2001 case evaluation, there were only two issues left for trial: (1) whether Plaintiff should be credited as having over 20 years of service for purposes of deciding whether the County had to pay 100% of the health care premiums, rather than the 75% level already ordered by the Court; and (2) the amount of actual damages sustained by Plaintiff. The issue of whether the County was required to pay the future premiums at 75% was no longer in the case – the Court had already ordered such payment.

The case evaluation panel was powerless to issue an award concerning the already-decided issue of whether the County had to pay at least 75% of the future premiums. In *R.N. West Constr. Co. v. Barra Corp. of America, Inc.*, 148 Mich. App. 115, 117 (1986), the case evaluation panel issued the following award:

> R.N. West Construction Co. pays Barra Corporation the sum of $7,000.00 but only upon delivery to R.N. West Construction Co. the 10 year written warranty in the nature of a 10 year manufacturer's guarantee of the roof of the State Office Building.

This Court of Appeals ruled, under previous rule GCR 1963, 316.1 – but noting the same analysis applies to MCR 2.403(O) – that the panel could not lawfully grant equitable relief, such as conditioning the payment obligation on the delivery of a guarantee. *Id.* at 117. Here, the case evaluation panel could not have included a requirement that the Defendant pay for future premiums nor could it have vacated the Court's prior ruling on that equitable issue.

The total adjusted verdict for purposes of deciding the sanctions issue should have been $22,608.00, including assessable costs and interest. This figure includes: $14,000 in damages found by the jury; $4,206 in other fees, costs, and pre-filing interest that were specifically included in the Judgment; $4,402 in interest between the date of filing and the date of the case evaluation. (**Exhibit 5**). As discussed above, to be ruled as having obtained a more favorable verdict, the verdict, as adjusted, had to exceed $44,000, which is 10% above the case evaluation award of $40,000. MCR 2.403(O). Clearly, $22,608 is *less than* the $44,000 figure Plaintiff had to reach to avoid being subjected to mandatory sanctions.

The Circuit Court, however, erroneously made some additions to the $22,608:

$6,749 for past premiums and over $50,000 as the present value of future premiums. **(Exhibit 5)**. In so doing, the Circuit Court included amounts that were not at issue in the case as of January 18, 2001, when the case evaluation was made. However, the Circuit Court had already ruled, through its May 31, 2000 grant of partial summary judgment, that Defendant was required to pay these premiums. As explained to the case evaluation panel, and as occurred at trial, the payment of 75% of the premiums that would be due in the future was no longer an issue in the case and the jury would not be asked to make any findings concerning such payments.

Neither the case evaluation panel nor the jury was deciding anything with respect to whether the County would have to pay 75% of the health care premiums. That decision was already made by the Circuit Court and could not be undone by the case evaluation panel and was not presented to the jury for its determination. The case evaluation award was, necessarily, *in addition* to the previously ordered payment of future premiums by the County. Nevertheless, in denying sanctions, the Circuit Court ruled that the applicable verdict for comparison to the case evaluation award included over $56,000 representing the premium payments previously ordered by the Court.

Because the 75% level of premium payments was required to be paid regardless of what the jury decided and regardless of what the case evaluation panel decided, it was irrelevant to the question of whether rejection of the case evaluation award and forcing the remainder of the case to trial was warranted. MCR 2.403(O) imposes sanctions in order to transfer the costs of the additional litigation to the rejecting party unless that party gains a more favorable result by causing the litigation to continue. *Keiser v. Allstate Ins. Co.*, 195 Mich. App. 369, 371-72 (1992). The Circuit Court's ruling, by

contrast, conflicts with this purpose by giving Plaintiff a "free pass." Under the Court's ruling, even had the jury found zero damages, Plaintiff would not have had to bear any of the cost of the additional, unnecessary litigation – contrary to the intent of MCR 2.403(O).

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Defendant respectfully requests that this Court reverse the decision of the Michigan Court of Appeals and/or remand this matter to the lower court with directions to enter an Order denying Plaintiff's Motion for Summary Disposition and enter a Judgment in favor of Defendant, dismissing the matter in its entirety. In addition, we ask this Court reverse the denial of Defendant's Motion for Case Evaluation Sanctions and remand the case back to the Circuit Court for entry of an Order in the amount of $52,053.12, which is the undisputed amount of case evaluation sanctions as already presented to the Circuit Court.

Respectfully submitted,

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Dated: July 29, 2004